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ABSTRACT

Since 1957 the Department of Defense has subjected all forms of speech of U.S. military personnel meant for publication to prepublication review based on security and policy criteria. The historical development of the Defense Department's prepublication review program and its specific implementation by the U.S. Air Force lead to questions of First Amendment implications and of impact on the marketplace of ideas. While there has been little objection to prior restraint of military speech for national security reasons, many people have argued against such restraint when it is based on policy reasons. William Lind of the Military Reform Institute has observed that the Air Force's failure to clear articles which conflict with established policy results in the publication of articles that are irrelevant to significant issues and of poor intellectual quality. Although the Courts have not found such prepublication review to be violative of First Amendment rights, the rapid expansion of military censorship should serve as a warning that apparently innocuous restrictions on speech can have a devastating effect on freedom of expression. (Eighty-five footnotes are included.) (MHC)

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PREPUBLICATION REVIEW OF GOVERNMENT EMPLOYEE SPEECH: A CASE STUDY OF THE DEPARTMENT OF DEFENSE AND UNITED STATES AIR FORCE SECURITY/POLICY REVIEW PROGRAMS

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On March 11, 1983, President Ronald Reagan signed National Security Decision Directive 84 (NSDD 84),[1] a presidential order that would have subjected from 120,000 to 5 million government officials and contractors to prior censorship of their writings and public statements.[2] The directive proposed a system of

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[1] National Security Decision Directive 84 , "Safeguarding National Security Information," March 11, 1983, reprinted in 9 Media Law Reporter 1759-60 (1983).

[2] Estimates of the number of persons subject to the directive vary widely. Press speculation has put the figure at from 1-2 million federal employees subject to this directive--the number granted access to any level of classified information from Confidential to Top Secret. The General Accounting Office has estimated that as many as 5 million persons would be covered by the act, including government contract personnel, and former contractors and government officials who have been granted access to classified information. Others limit the figure to between 120,000 and 127,000 -- the number of current and former government officials and contractors actually granted access to a special category of classified information labelled "Sensitive Compartmentalized Information" (SCI). The exact number is unknown, even by the Executive Branch. According to testimony by Mr. Steven Garfinkel, Director of the Information Security Oversight Office of the U.S. General Services Administration, "No one knows how many employees actually have access to classified information". Mr. Garfinkel's office is responsible for overseeing the Executive Branch's classification program. See testimony in U.S. Congress, House, Committee on the Judiciary. Presidential Directive on the Use of Polygraphs and Prepublication Review. Hearings Before the Subcommittee on Civil and Constitutional Rights. 98th Cong., 1st and 2nd Sess., 1984, p. 81.

unprecedented peacetime government censorship in the United States, according to its critics.[3]

Criticism of the presidential directive was diverse and swift. Noted media attorney and First Amendment expert Floyd Abrams denounced the Administration's new "information limiting policy" established through NSDD 84; calling it "a major change in American policy with immense First Amendment implications."[4] In a letter to President Reagan, Edward R. Cony, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors wrote:

> The American Society of Newspaper Editors urgently requests you to rescind your secrecy order of March 11, 1983, because it violates the First Amendment rights of free speech and free press and constitutes Peace-time censorship of a scope unparalleled in this country since the adoption of the Bill of Rights in 1791.[5]

At Congressional hearings to probe the impact of NSDD 84, former intelligence agents recounted their experiences with the Central Intelligence Agency's system of prepublication review.[6] Representatives of federal employees unions, public interest

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[3] Senator Thomas F. Eagleton, has labelled the plan "the most massive citizenship censorship program in our country's history". See his testimony in U.S. Congress, House, Committee on the Judiciary. Hearing on H.R. 4681 Federal Polygraph Limitation and Anti-Censorship Act. Subcommittee on Civil and Constitutional Rights. 98th Cong., 2nd Sess., 1984, p. 3.

[4] Presidential Directive Hearings, pp. 8, 16.

[5] Letter dated May 11, 1985, reprinted in ibid., p. 47.

[6] See material provided by former CIA agent Ralph W. McGehee, ibid. pp. 107, 116.

groups and publishers assailed the policy as an unnecessary and unwarranted system of prior restraints on freedom of expression of current and former government officials.[7]

Despite assurances from Executive Branch witnesses that the directive was necessary for the protection of national secrets[8] and that it would be applied "evenhandedly" to both supporters and opponents of Administration policy,[9] congressional leaders expressed grave misgivings about the potential impact of the directive. Congresswoman Pat Schroeder, co-chair of House hearings on NSDD 84, feared that it would "breed a new level of timidity" into government and contractor employees covered by the

[7] See testimony of Kenneth T. Blaylock, president, American Federation of Government Employees, ibid., pp. 39-51; Irwin Karp, counsel to the Authors League of America, Inc., ibid., pp. 79-80; Mark Lynch, on behalf of the American Civil Liberties Union, ibid., pp. 26-38.

[8] See testimony of Richard K. Willard, Deputy Assistant Attorney General, Civil Affairs Division, Department of Justice, ibid., pp. 67-78. Mr. Willard chaired an inter-departmental group examining ways to reduce the unauthorized release of classified information. The recommendations of the group, contained in the "Willard Report" resulted in NSDD 84. The "Willard Report" is reprinted as Appendix 2 ibid., pp. 166-180.

[9] In his testimony before the Subcommittee on Civil and Constitutional Rights, Mr. Charles Wilson, head of the CIA's Publications Review Board, outlined the operation of the Agency's prepublication review program. He stated "a paramount principle guiding the board since its creation has been one of evenhanded and fair treatment to all authors regardless of their expressed or implied friendliness or unfriendliness towards the agency". Ibid., p. 92. As evidence of the "evenhanded" approach, Wilson pointed to the $10,000 fine levied against former CIA Director William Colby for failing to delete all material required by the CIA's Publications Review Board from an overseas foreign language version of a book he submitted for prepublication review. Colby is considered a supporter of the Reagan Administration and endorses the CIA's prepublication review requirements.

directive. "Their willingness to speak out, even internally, will vanish," she observed. "This directive will cut off the public from much of the information it needs to make informed decisions."[10]

Indeed, the most chilling aspect of NSDD 84, one civil libertarian wrote, was "the likelihood that experienced, knowledgeable people would shy away from public discussion of matters where their expertise was greatest."[11] The universally expressed fear by critics in Congress and the press was that commentary on the activities, policies and programs of the government could be "choked off" at the source of greatest expertise -- current and former government officials and employees most intimately familiar with them.[12] In the face of stiff opposition from Congress, the Reagan Administration put it plans to implement NSDD 84 in abeyance.

Overlooked in the rush of criticism of this new directive were existing prepublication review requirements already in place in many federal agencies that regularly deal with "national security" information -- requirements that remained in place despite the Administration's decision to shelve NSDD 84. Before President Reagan signed NSDD 84 the Department of State,

[10] Ibid., p. 66.

[11] Donna A. Demac, Keeping America Uninformed: Government Secrecy in the 1980's (New York: The Pilgrim Press, 1984), p. 21.

[12] David S. Bogen, Bulwark of Liberty: The Court and the First Amendment (Port Washington, N.Y.: Associated Faculty Press, Inc., 1984), p. 126.

Department of Defense, Central Intelligence Agency, National Security Agency and The Atomic Energy Commission all had various prepublication review requirements already in existence.[13]

One of the earliest of these formal programs was provided for in the Atomic Energy Act of 1946.[14] Since its creation in 1947, the Central Intelligence Agency has required secrecy agreements from all of its employees as a condition of employment and for access to classified information.[15] The CIA's current system of a prepublication review, implemented by its Publication Review Board, has been in place since 1977.[16]

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[13] Twelve federal agencies required prepublication review of for all their employees, regardless of whether they have access or not. The programs vary widely from agency to agency. See U.S. General Accounting Office. Polygraph and Prepublication Review Policies of Federal Agencies, Report No. GAO/NSIAD-84-135 (1984), p. 3.

[14] 42 U.S.C. ss2277 (1982). For a discussion of early concerns over the dissemination of information about atomic energy and the information clearance procedures of The Atomic Energy Commission, see Robert E. Summers, ed., Federal Information Controls in Peacetime, (New York: The H.W. Wilson Co., 1949).

[15] A copy of the secrecy agreement signed by CIA agents is contained as Attachment A to the testimony of Charles Wilson, Director of the Office of Public Affairs and Chairman of the Publications Review Board of the Central Intelligence Agency, in Presidential Directive Hearings, p. 93. Pertinent parts of the two secrecy agreements signed by Frank Snepp, former CIA agent, can be found in United States v. Snepp, 595 F. 2d 926, 930 (4th Circ., 1979). Full text of the agreements can be in "Petition for Certiorari" Snepp v. United States, 444 U.S. 507 (1980) Appendix D, pp. 58a-63a.

[16] For a description of the Secrecy Agreement and history of the CIA's prepublication review program, see "Statement of Charles E. Wilson, chairman, Publications Review Board, Central Intelligence Agency" made April 28, 1983 before the House Subcommittee on Civil and Constitutional Rights, Presidential Directive Hearings, pp. 90-103.

Yet another prepublication review program exists that covers the largest number of federal employees -- the Department of Defense (DOD). Here, prepublication review has its greatest impact on the marketplace of ideas because, in the area of national security, the government itself holds a virtual monopoly on the information that constitutes those ideas.[17]

A review of the Defense Department's prepublication review program will help us understand the First Amendment implications of a system of prepublication review like that proposed in NSDD 84. Does the requirement for review prior to publication constitute a choking off of expression by government experts? Is the marketplace of ideas deprived by a system of review?

In this paper we will examine the historical development of the Defense Department's prepublication review program in general. Then, specifically, we will examine how the U.S. Air Force implements the Defense Department's prepublication review requirements as a case study of its impact on the marketplace. How does it work? What problems have been experienced in its implementation that might serve as warnings to policymakers?

Military Censorship

Censorship of military secrets-- national security information -- is not new. Its legal origins can be traced to Great Britain, where in 1649 Parliament enacted a law permitting

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[17] Francis A. Rourke, Secrecy and Publicity: Dilemmas of Democracy (Baltimore, Md.: The Johns Hopkins Press, 1966) p. 205.

the Secretary of War to "license" all news of the army.[18] Censorship of military information in America was officially sanctioned with the passage, in 1725, of a Massachusetts Order-In-Council, requiring the newspapers of Boston "upon their peril not to insert in their prints anything of the public affairs of this province relative to the war without the order of the government."[19]

During the American Revolution censorship of military information was nonexistent and was only partially employed in the War of 1812 and the Mexican War of 1846-1848.[20] It was not until the American Civil War that censorship was widely employed to protect military information --and then with only partial success.[21] From this era until World War II, censorship of military information was almost exclusively limited to periods of declared war and armed conflict between nations. It was not until after World War II that pressures increased to extend government secrecy -- especially military secrecy -- beyond the confines of war.[22]

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[18] Jack A. Gottschalk, "Consistent with Security...A History of American Military Press Censorship" Communications and the Law 5(Summer 1983):35.

[19] Russell J. Wiggins, Freedom or Secrecy, (New York: Oxford University Press, 1964) p. 94.

[20] Gottschalk, p. 36.

[21] Ibid.

[22] See Francis E. Rourke, Secrecy and Publicity: Dilemmas of Democracy, (Baltimore: Johns Hopkins Press, 1961).

Centralization of Control of the Military (and Control Over the Release of Military Information)

The end of World War II heralded a significant change in peacetime military organization; with the passage of the National Security Act of 1947,[23] which established a centralized defense establishment under a single preeminent authority, the Secretary of Defense. This unification of the defense establishment was opposed by many in the military. Despite vocal opposition, the act was passed by Congress and unification was law, but not necessarily a fact.

The individual civilian service secretaries, including the secretary of the newly created Air Force, were still independent advocates of their department's views and, along with the Secretary of Defense, sat on the President's Cabinet and the National Security Council. There was no budget coordination by the services with the Secretary of Defense. The service secretaries continued to plead their own department's budget directly to the President and Congress each year, unconstrained by any centralized review by the Defense Department. Each service maintained large public information units, independent of any control by the newly formed Defense Department. This independence served to produce many defense spokesmen advocating very different budget and policy priorities in the press, before Congress, and the American public.

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[23] National Security Act of 1947, July 26, 1947, ch. 323, 61 Stat. 495.

The National Security Act of 1949 strengthened the position of the Secretary of Defense over the individual service secretaries and removed the military departments from the Cabinet and the National Security Council.[24] The Amendments also provided that the defense budget presented each year to the Congress would be a coordinated one, combining the separate requests of each of the military services, approved by the Secretary of Defense. This removed some of the independence of the individual services enjoyed under the 1947 act.

The reorganization also brought with it an attempt by Secretary of Defense Forrestal, to expand the scope of review of information released by the Department and the services to include "policy" as well as "security" considerations. The effort failed after four months of "public clamor" over the new practice.[25]

American efforts to contain Communist expansion abroad, culminating in the start of the Korean conflict in 1950, hampered continued unification efforts within the Defense establishment. Internal conflicts continued within the Department of Defense; conflicts that found their way into the public with increased frequency.

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[24] For an authoritative account of the early problems encountered in the organization of this country's Department of Defense, see C.W. Borklund, The Defense Department, (New York: Praegar, 1968), esp. Chapter II.

[25] Juergen Arthur Heise, Minimum Disclosure: How the Pentagon Manipulates the News (New York: W.W. Norton & Co., 1979), p. 97.

> (P)art of the conflict [between the new Department of Defense and the individual services] was spurred by military department efforts to aid through press publicity the progress of their pet projects -- particularly when the project [was] having trouble earning top Defense Department approval on its own. News 'leaks' designed to undercut the Defense Secretary's negative view of an individual service proposal plagued both [Secretaries of Defense] Forrestal and Louis Johnson.[26]

Based partly on the lessons of Korea, President Eisenhower introduced the Department of Defense Reorganization Act of 1953. This removed many of the ambiguities of the Secretary of Defense's position, vis-a-vis the individual services and strengthened the strong, central role the Secretary played in America's modern defense organization.[27] This act also strengthened the central role of the Defense Secretary in releasing national defense information to the American public not only by DoD, but by the individual services as well.

Origins of Prepublication Review -- The "Carney Affair"

While the Secretary of Defense was buttressed in his legal and statutory responsibilities by these successive acts and amendments, the play for public opinion continued. In an authoritative account of the Defense Department, an author observed that:

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[26] Borklund, pp. 241-242.

[27] Ibid., pp. 65-67.

> The services still found ways to take their cases direct to the public if the climate within the Department of Defense was not entirely favorable to their own policies. Generals wrote plaintive magazine articles and books or gave angry speeches. Stories were planted anonymously, often with newsmen more anxious to garner a headline than to present a thorough analysis of a problem.[28]

The conflict came to a head over what has been called the "Carney Affair."[29] Admiral Robert B. Carney, "an Indochina hawk before his time,"[30] was Chief of Naval Operations and the Navy's senior uniformed leader. On the evening of March 24, 1955, at a dinner meeting with reporters in Washington, D.C., he said "on background"[31] that the Communist Chinese would attack the Nationalist Chinese-held islands of Matsu and Quemoy by the middle of April that year.[32] The comments resulted in "scare"

[28] Ibid., pp. 242.

[29] Miles Beardsley Johnson, The Government Secrecy Controversy: A Dispute Involving the Government and the Press in the Eisenhower, Kennedy and Johnson Administrations, (New York: Vantage Press, 1967), p. 13.

[30] David Wise, The Politics of Lying: Government Deception, Secrecy and Power, (New York: Random House, 1973) p. 289.

[31] The "background" rule of attribution called for identification of the source of the comments in only general terms, not specifically linked to Admiral Carney by name or position.

[32] For a detailed account of what transpired at that "background" meeting with reporters, see Robert Roth's story in the Philadelphia Bulletin, April 6, 1955, pg. 1, 14. Roth, though not present at the meeting, prepared a full account of the statements by Admiral Carney based on the shorthand notes of a reporter present at the Statler Hotel. In response to a claim by Admiral Carney during a Congressional hearing that he was misquoted, the reporter, bound by the groundrules of nonattribution, turned over his notes to Roth who prepared a

headlines around the world and provoked an angry response by both the President (who was at that time in delicate negotiations over the crisis) and the Secretary of Defense.

The most immediate response was a directive issued by Secretary of Defense Charles E. Wilson, ordering military people who wanted to talk or write for publication to get clearance from the Secretary of Defense.[33] This order to all military departments, now under the direct control of the Secretary of Defense, inaugurated a formal and, this time, permanent prepublication review system within the Department of Defense. The most significant aspect of the directive was that it was not limited to discussion of classified information -- unclassified information was covered as well. In fact, Wilson required that all news or handouts on unclassified defense subjects be submitted to his office for clearance at least three days prior to public release.[34]

The press charged that a news and information "blackout" had been imposed on the military establishment by the Secretary of Defense. A writer for Time magazine, wrote:

> [Secretary of Defense] Wilson was not acting on his own; he was ordered by President Eisenhower to plug the leaks in the

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detailed report with exact quotes by the Admiral to disprove the claims of misquoting. Another source of information on what transpired at that background session is Robert L. Riggs, "What Political Reporters Were Told Off the Record," New Republic, April 11, 1955, p. 8.

[33] Johnson, p. 35.

[34] Ibid., p. 30.

> Pentagon's information dike. The President felt that secret defense information was getting out, and too many voices were speaking for the services.[35]

While these restrictions reflected the Eisenhower Administration's frustration with leaks of information from the Pentagon, Secretary Wilson did not confine his efforts to limit the release of information to the military. Shortly after his directive to the military services, Wilson wrote to defense contractors, urging them to curb their advertising and public information efforts. Anything they wanted cleared by DoD for publication had to make a "constructive contribution" to defense.[36]

Through his action Secretary Wilson had added yet another requirement to the "security" criteria for release of information to the public -- that information not only be unclassified, but that it also must be "constructive." When asked to define what he meant by "constructive," Secretary Wilson responded that the standard was "a little hard to define" and involved matters of "propriety and policy" in addition to the traditional military concerns of security and classification.[37]

An almost universal outcry came from the press over these

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[35] "Iron Curtain in the Pentagon," Time, April 18, 1955, p. 58.

[36] Johnson, p. 36.

[37] "Wilson Warns Contractors on Security," Aviation Week, April 18, 1955, p. 13.

new criteria for the release of information.[38] This criticism from the press was partly responsible for elimination of the "constructive" requirement from a formal Department of Defense directive governing the release of information to the public, which was signed by the Secretary of Defense in 1957.[39] The new directive, however, stipulated that all information originating within the defense establishment and intended for release to the public must be reviewed using traditional security criteria, and it must be reviewed for conflict with established policies or programs. Thus was born the second pillar of the Department of Defense prepublication program now titled "security and policy review."

Security and Policy Review

The twin pillars of "security" and "policy" in the Department of Defense's (DoD) prepublication review program continued to be legitimized in revisions to directives governing the organization and function of the Office of the Assistant Secretary of Defense for Public Affairs. For example, the 1959 revision of DoD Directive 5122.5 provided that, among other

[38] See for example, "Censorship at the Pentagon", Time, July 4, 1955, p. 62; "Administration Has Censorship Blues", Business Week, July 9, 1955, p. 68; "Brownout in Washington," Time, May 9, 1955, p. 78; "There Is No 'Gray' Security Area", Aviation Week, August 22, 1955, p. 114; and "Iron Curtain at the Pentagon", ibid.

[39] U.S. Department of Defense, Assistant Secretary of Defense (Public Affairs) Directive 5122.5 (August 17, 1957); and U.S. Department of Defense, Security and Policy Review, Directive 5230.9, Section IV (August 17, 1957).

functions, the Assistant Secretary of Defense (Public Affairs) was to:

> ...Provide for the review from a security standpoint under the provisions of Executive Order 10501, of all material originated within the Department of Defense, including testimony before Congressional Committees, or by its contractors for public release or for publication by departmental personnel as individuals, and of material submitted by sources outside the Department for such review.[40] [Emphasis added]

As well as being required to:

> ...Provide for the review of official speeches, press releases, and other information originated within the Department of Defense for public release, or similar material submitted for review by other Executive agencies of the Government, for conflict with established policies or programs of the Department of Defense or the national government.[41] [Emphasis added]

The same responsibility with regard to the review and release of information about the Department of Defense, with only minor word changes, continues to the present day.

Each of the military services must implement the directive for their members according to guidelines set by the Department of Defense. The services, however, are permitted to expand and amplifying the DoD directive as required to suit their individual requirements. For the U.S. Air Force, the implementing

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[40] U.S. Department of Defense, Assistant Secretary of Defense (Public Affairs) Directive 5122.5 (February 12, 1959) Section III (3), p. 2.

[41] Ibid., Sect. III (4), p. 2.

regulation is Air Force Regulation 190-1, Public Affairs Policies and Procedures;[42] specifically Chapter 6, "Security and Policy Review."[43]

Air Force Security and Policy Review

Information in any form[44] that relates to plans, policies, or operations of the U.S. Air Force, the Department of Defense, or the Federal Government and that is intended for release through any public medium must be sent "through channels" to Headquarters, United States Air Force. For the Air Force, the Office of Public Affairs, Security Review and Plans Division at the Pentagon is responsible for reviewing and clearing information.[45] Information proposed for release is reviewed to

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[42] U.S. Department of the Air Force, Public Affairs Policies and Procedures, Air Force Regulation 190-1, (February 16, 1982, with changes). Superceded U.S. Department of the Air Force, Information Policies and Procedures, Air Force Manual 190-9 (September 22, 1972).

[43] Ibid., pp. 148-152.

[44] Includes public speeches, conference papers, notes for public appearances, scripts, news releases and any audio or visual information such as slides, film or videotape, as well as articles, books, essays and research reports produced for open publication. In short, if it takes any written or visual "form", the words and pictures must be "cleared" for release to the public.

[45] AFR 190-1, Sect. B, 6-7, p. 149. "Through channels" means that each work proposed for release must be reviewed at successive levels of the organization to which a military or civilian service member belong.

determine if its release would be harmful to national defense,[46] to insure that it does not contain classified information,[47] and that it does not conflict with established national, Department of Defense or Air Force policy.[48] The Air Force stipulates unequivocally in its governing regulation that refusal to clear information in order to conceal "administrative error or inefficiency" is not authorized.[49]

Information that meets these three criteria can be reviewed and released at the "lowest competent review level."[50] This means that unclassified information of a purely local or regional nature can be released by a local commander or public affairs officer without referral to the Pentagon.[51] However, information that deals with military intelligence, foreign policy, or new

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[46] Ibid., Sect. A, 6-1a, p. 148. This is a somewhat "vague" statement from the regulation. At first reading it sounds very similar to the "constructive" criteria established by Secretary of Defense Wilson. However, the source of authority for this requirement is cited as Executive Order 12356 as implemented by Department of Defense Regulation 5200.1R and Air Force Regulation 205-1. The Executive Order establishes the current classification system in effect in the Executive Department of the Federal Government. The two regulations deal solely with the designation, handling, marking, safeguarding, access, destruction, and declassification of classified information.

[47] AFR 190-1, Sect. A, 6-1b, p. 148.

[48] Ibid.

[49] Ibid., Sect. A, 6-4b, p. 149.

[50] Ibid. Sect. 6-1b, p. 148.

[51] Ibid. Sect. A, 6-2a, p. 148.

weapons under research and other topics must be reviewed by the Pentagon.[52]

Who Must Submit?

All members of the Air Force, military and civilian, as well as members of the Air Reserve and Air National Guard presently serving on active duty must submit information for review if it is proposed for public release.[53] Persons retired or separated from the service, and members of the Air Reserve and Air National Guard not on active duty are not compelled to submit

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[52] Currently, six broad categories of information must be submitted for review by the Pentagon: (1) information of national interest or with foreign policy implications; (2) information that originates or is proposed for release in Washington, D.C.; (3) information concerning significant policy or programs that are under the purview of other federal agencies; (4) information concerning the existence, characteristics, potentialities or capabilities of new weapons systems, space vehicles and their military application, new weapons, new aircraft, missiles; radiological, electronic, psychological and chemical-biological warfare research; equipment related to any of these or modifications and improvements that significantly alter or change the system or its capabilities; (5) information that reflects, implies or reveals the degree of success of intelligence efforts; and (6) other information categories that are, from time-to-time, designated by the Air Force or the Department of Defense as requiring clearance by the Pentagon. Ibid., Sect. B, 6-7a to 6-7f, p. 149. An example of this sixth catch-all category is "critical military technology" — broad areas of basic research and technology of extraordinary interest and benefit to potential adversaries such as chemical and particle beam laser research, radar technology and others.

[53] Ibid., Sect A, 6-6a, p. 149.

articles, speeches or other information for security and policy review. However, review is offered to them as a "service."[54]

However, three-star generals or above, and their civilian equivalents, must submit their remarks on all but strictly "local" issues for security and policy review regardless of whether they fit into any of the six broad categories requiring mandatory submission to the Pentagon. Because of their rank and position, remarks by these members of the Air Force are always considered "of national interest"[55] by both the service and the Department of Defense.

Time Limits

The Air Force requires ten workdays after receipt of material proposed for public release to complete a "typical" security and policy review.[56] A slightly longer period of fifteen workdays is stipulated for more lengthy articles or papers.[57]

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[54] Ibid. Sect. A, 6-6b. Although not specifically stated in this regulation, former members of the Air Force remain subject to criminal prosecution for the release of classified information under the various sections of the Espionage Act of 1917. In addition, Regular officers and noncommissioned officers are subject to "recall" to active service after separation or retirement for varying periods of time. If recalled, they can be subjected to prosecution in military courts under the Uniformed Code of Military Justice.

[55] Ibid., Sect. B, 6-12, p. 150.

[56] Ibid., Sect. C, 6-13, p. 150.

[57] Ibid.

Thirty days is typically required in cases concerning higher level reviews, however, extraordinary procedures are provided for in the clearance of more timely "spot news" material.[58]

The Review Procedure

When an article, speech or other material is received for review it is assigned to a "reviewing officer" assigned to the Air Force Office of Public Affairs Security Review Branch. The reviewing officer determines who must review the material before it can be cleared for release. The more areas or topics an article or speech covers, the greater the number of Air Staff offices and individuals required to review the material for security, policy and accuracy.[59]

The reviewing officer coordinates the procedure of sending the material to the offices where it must be reviewed. Once reviewed, the materials are returned to the Security Review Branch where the reviewing officer evaluates the changes and consolidates all, some or none of them onto a single copy.

Changes, including deletions, are annotated and stamped on the document as either "recommended" or "mandatory." Elimination of classified material is always mandatory. Changes intended to

[58] Ibid., Sect. C, 6-13h, p. 150; and Sect. A, 6-2b, p. 148.

[59] Although the regulation does not require "editorial review" -- editing of content for clarity or accuracy -- coordinators are permitted to recommend changes to the author for these reasons. Although not included as a criteria for clearance, excessive factual errors can be cause to deny release approval. See ibid., Sect. D, Figure 6-2(5), p. 152.

eliminate material in conflict with "policy" are usually mandatory. Editorial changes are included at the discretion of the reviewing officer and are forwarded as recommendations to the author. This annotated and stamped document is returned to the author marked "Cleared for public release" or "Cleared as amended." If clearance is denied, a letter explaining reasons for denial of clearance is included with the returned document.[60]

Appeal Procedure

Authors may appeal the results of a security and policy review. For example, mandatory deletions or changes and denials of clearance may be appealed by providing "additional rationale or authoritative evidence."[61] The reviewing officer forwards the rationale and evidence to the agency responsible for the change in order to determine whether, in light of the new evidence or argument presented by the author, the material can be cleared for release. If at this point an appeal is not successful the author may request that the appeal be considered at higher levels in the agency, such as the Department of the Air Force or Department of Defense for resolution.[62]

There is no evidence that any author has appealed the results of an Air Force security and policy review decision

[60] Ibid., Sect. D, 6-19g, and Figure 6-2, p. 152.

[61] Ibid., Sect. C, 6-17, p. 151.

[62] Ibid. Sect. C, 6-17b, p. 151.

through the courts.[43] However, the absence of any judicial challenge is not an indication that the Air Force's security and policy system is either popular or uncontroversial. While on the surface the system seems a reasonable mechanism astride the marketplace of ideas, in practice it is far from innocuous.

The Impact of Security and Policy Review

Few in the military question the need to keep secrets. Therefore, little objection is found to Air Force and DoD requirements for review of information for "security" reasons. However, the need for policy review is frequently questioned.[44]

William Lind, an adviser on national defense issues to former U. S. Senator Gary Hart and President of the Military Reform Institute, observes that few Air Force officers write and

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[43] There is at least one case where a civilian scholar, on temporary contract to the Air Force, was denied clearance of an article he prepared on the cruise missile while a Senior Research Fellow employed by the Air University, Maxwell Air Force Base, Ala. Failing appeal the professor, after concluding his contract and returning to his civilian institution to resume teaching, wrote his Congressman and was successful in forcing approval by DoD (with changes) to his article. Letter from Lieutenant General Thomas C. Richards, Commander, Air University to General Larry D. Welch, Vice Chief of Staff, U.S. Air Force, Washington, D.C., February 22, 1985.

[44] The issue of "security and policy review" has been heatedly debated in the columns of Air University Review. See for example Tom Lytle and Alex Gimarc, "More Simplistic Solutions" Air University Review 36 (July/August 1985): 100-104; Lorenzo M. Crowell, "On Reading Writing and Policy Review" ibid., pp. 104-106. For a rebuttal, see Colonel Ronald B. Johnston, Letter-to-the-editor, Air University Review 37 (November/December 1985): 95.

publish "imaginative articles on controversial issues."[65] He attributes the lack of debate about issues vital to the future of air power and doctrine to the "censorship" imposed on Air Force officers by the system of security and policy review.[66]

Calling for an end to this "unilateral disarmament in the war of ideas,"[67] Lind writes:

> (T)he Air Force routinely denies permission to publish articles that conflict with established policy....The intellectual quality of published material is poor because only articles that are essentially irrelevant to significant issues or that support established policies are allowed to see the light of day.[68]

Lind is not alone in his criticism. One military officer, a frequent contributor to the Air Force's only professional scholarly journal, Air University Review, contends that "a large number of important articles and studies" produced by Air Force officers attending the Air Force's professional military schools at Air University have been denied publication because of security and policy review. "Many, it would seem, were denied

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[65] William S. Lind, "Reading, Writing and Policy Review: The Air Force's Unilateral Disarmament in the War of Ideas," Air University Review 36 (November/December 1984): 69-70.

[66] Ibid., p. 70. Lind claims that the problem is unique to the Air Force. However, his claim is rebutted in Colonel Johnston's letter to the Air University Review, ibid. Colonel Johnston was the Air Force's chief of security and policy review at the time Lind's article and several others appeared in that publication criticizing the review requirement.

[67] Lind, p. 69.

[68] Ibid.

clearance on questionable policy grounds and perhaps could be accurately characterized as victims of Pentagon parancia," he wrote.[69]

A former editor of Air University Review recently complained about the Air Force's "policy" review of articles for that publication during his tenure there. He wrote:

> All too frequently...reviewing officials recommend against clearing articles that are critical of established policies. Is this surprising? Certainly not, for these officials have vested interests in policies they help to make. In other words, our [Air Force] policy and security review process is the bureaucratic equivalent of having the fox guard the hen coop.[70]

The issue of censoring military officers who disagree with policy is not a new one. President Harry S Truman used a form of censorship in relieving General Douglas MacArthur of command in Korea for the outspoken general's public disagreements with his Commander-in-Chief. The "tough on communism" speeches of many admirals and generals in the 1950s concerned several American leaders and U.S. allies.[71] Some U.S. military officers accused political leaders of being too soft toward Communism, openly

[69] Lieutenant Colonel Dennis M. Drew, "Beware of Simplistic Solutions", Air University Review 36 (January-February 1985):103.

[70] Lieutenant Colonel Donald R. Baucom, Letter to the Editor, Air University Review 37 (July/August 1986):112.

[71] Captain James E. Swartz, U.S. Army Reserve, "The Development of the Role of Assistant Secretary of Defense (Public Affairs) As A Reflection of Mass Media Uses and Functions in the United States Federal Government," (Master's thesis, U.S. Army Command and General Staff College, Fort Levenworth, Kansas, 1980) p. 52.

voicing personal opinions about government policy and political matters.[72] These incidents contributed to stronger and stronger efforts by their civilian superiors in the Defense Department to keep the military out of the political arena -- efforts that continue today.

Why keep military officers out of the marketplace of ideas in debating political affairs? The sentiment was aptly summarized in Secretary of Defense Robert McNamara's comment during a television appearance in 1961. When asked why he did not approve of military officers commenting on the conduct of foreign policy, an essentially political domain, McNamara replied:

> Because a military officer speaking on a matter of foreign policy is speaking in a field that lies outside his responsibility and yet as a representative of the government--an official representative--his words are taken as the policy of the government. This is quite inappropriate.[73]

This viewpoint was codified by McNamara in approval of a new Department of Defense directive in 1961 that "in all public discussions, all officials of the Department should confine themselves to defense matters."[74] By this time the widespread, entrenched practice of reviewing the public statements and writings of military officers for security and policy was viewed,

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[72] Ibid., p. 46.

[73] Ibid., p. 54.

[74] Ibid., p. 48. This requirement was codified in DoD Directive 5230.13 on May 31, 1961, according to Swartz.

even by the Congress, as an inherent right of the executive branch in exercising civilian control over the military.[73] This sentiment exists today in the continued requirement to examine public writings and statements by military personnel for conflict with policy.

As long as men and women in the military have someone looking over their shoulder, judging whether or not something they write will be published, the censorship debate will continue, observes Brigadier General Michael P. McRaney, Air Force Director of Public Affairs. "It's very important for Air Force members to understand that the military is an instrument of national policy, not a maker of national policy," General McRaney remarked recently in an interview on the Air Force's prepublication review program.[74]

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[73] There appears to be only one instance of a Congressional hearing on the practice of security and policy review within the Department of Defense since its formalization in 1957. Hearings held in 1961 by the Special Preparedness Subcommittee of the Senate's Committee on Armed Services. The hearings did not focus on the First Amendment implications of the Defense Department's security and policy review program. In fact, the propriety and desirability of the program was strongly affirmed by the subcommittee. See U.S. Congress, Senate, Committee on the Armed Services. Military Cold War Education and Speech Review Policies. Senate Report, Subcommittee on Special Preparedness. 87th Cong., 2nd sess., 1962. For a popular account of the hearings see Clark R. Mollenhoff The Pentagon, (New York: Putnam, 1967), p. 261.

[74] Personal interview with Brigadier General Michael P. McRaney, April 11, 1987, in Durham, N.C.

First Amendment Implications

Few in the military service have or will argue against a system of "prior restraint" of their speech, or the speech of others that is designed to protect legitimate military secrets, sensitive diplomatic exchanges and initiatives, or closely held intelligence products, sources, and methods. It is, after all, the business of the soldier to keep dark what he is doing and to look on with disfavor those who seem to have a careless disregard for the nation's security.[77]

In fact, the current system of security review does offer a some protection to the military member writing for publication on sensitive, potentially classified issues. According to Major Michael B. Perini, an Air Force public affairs officer and freelance author who contributes many articles on military topics to civilian publishers:

> A review for security, making sure that what I write doesn't reveal classified information, is good for me as a writer. If I didn't submit my work for security clearance and after it was published it was found to contain classified information, I would be subject to criminal indictment in civilian courts, prosecution in the military justice system, or worse, both! I don't have a problem with security review for just that reason; it protects me from prosecution.[78]

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[77] Herbert Brucker, Freedom of Information, (New York: MacMillan, 1949), p. 170.

[78] Telephone interview with Major Michael B. Perini, U.S. Air Force officer, student at the Armed Forces Staff College, Norfolk, Va., on April 12, 1987. Major Perini is a "veteran" of the Air Force security and policy review system, having submitted and successfully cleared more than 20 articles since he began

However, many others would, and have, argued more vociferously against system of prior restraint of their speech for mere policy reasons. Air Force officers who attempt to publish critical views quickly find out how restrictive the policy part of security and policy review works, one military writer observed.[79] He wrote, "busy military strategic authors attempt this clearance process once or twice, then, in frustration, quit writing for publication."[80]

When policy involves questions of strategy, technology, and similar military-related topics, why should military officers be denied access to or discouraged from entering the marketplace of ideas to join in the debate? Surely the courts would take a dim view of this practice, particularly when material is kept from the marketplace not for any legitimate security concerns, but for sometimes arbitrary policy considerations alone. Is a remedy to the systematic prior restraint of expression of military officers likely through the courts?

A review of the case law reveals that the courts appear unsympathetic to their plight. Both the Supreme Court and the Court of Military Appeals consistently have maintained that restrictions on freedom of speech for men and women in the

writing as an Air Force officer.

[79] Lt. Colonel Baucom, p. 113.

[80] Ibid.

military face lower constitutional hurdles than would be tolerated in civilian society.[81]

The government's successful prosecution of former CIA agent Frank Snepp for publishing a book without fulfilling his requirement to submit it for prepublication review would appear to strengthen the existing Air Force and DoD security and policy review requirements, not weaken them on First Amendment grounds.[82]

In fact, emboldened by their success in Snepp, the administration proposed to expand the prepublication review requirements embraced by the Supreme Court in its decision and seeks to apply them to greater and greater numbers of federal employees as a condition of employment. Although Congress has succeeded in getting the Administration to agree to curb its

[81] U.S. v. Priest, 21 U.S.C.M.A. 564, upholding military conviction for "revolutionary rhetoric" by a Navy seaman who advocated desertion and attacked U.S. involvement in Vietnam in an underground newspaper distributed on a military installation; Parker v. Levy, 417 U.S. 733 (1974), upholding the court martial of an Army captain for counseling soldiers to refuse to fight in Vietnam; and two related cases of military speech, Brown v. Glines, 100 S. Ct. 594 and Secretary of the Navy v. Huff, 100 S. Ct. 606 (1980), upholding a commander's right to forbid distribution of petitions or literature on a military installation without prior permission. For a comprehensive review of the judiciary's deference to restrictions of First Amendment freedoms of service members by the military, see Cathy Packer, "Freedom of Expression in the American Military: A Modeling Analysis" (Ph.D. diss., University of Minnesota, 1987).

[82] 444 U.S. 507 (1980) (per curiam). Although Snepp and his lawyers challenged the government's prepublication review agreement on First Amendment grounds, the Court declined to decide the case on that basis, electing instead to treat it as a civil "contract" issue. See Orentlicher, Diane F. "Comment: Snepp v. United States: The CIA Secrecy Agreement and the First Amendment," 81 Columbia Law Review 662, April 1981.

attempts to apply lifetime censorship requirements on former government officials and to drastically reduce its application of polygraph testing to fewer federal employees, implementation of other aspects of NSDD 84 are underway. DoD is now requiring members of the armed forces with access to classified information to sign nondisclosure agreements as a condition of further access to classified information.[83] These agreements, a form of contractual secrecy pledge, have never been required before even though a system of prepublication review has been in place for over three decades. Failure to sign the agreement, according to the language of the agreement, may result in termination of any security clearances, removal from any positions requiring clearances and termination of employment.[84]

Military censorship is now no longer limited to times of war, nor is it limited solely to the military -- it has become a peacetime reality. Like military censorship, NSDD 84 was

[83] Standard Form 189, Classified Information Nondisclosure Agreement, 32 C.F.R. 2003, under the authority of Executive Order 12356.

[84] Ibid., Sect. 4. Implementation of SF189 has been met with opposition in the Congress and in the courts. On August 17, 1987, the National Federation of Government Employees filed a lawsuit in federal district court seeking to overturn use of the form as a violation of employees' rights to free speech and due process. Pat Dalton, "Revoked Security Clearances Returned," Air Force Times, 14 September 1987, p. 3. Senator Charles Grassley and Representative Jack Brooks coauthored an amendment to the Fiscal Year 1988 spending bill barring use of federal money to implement or enforce SF189 pending congressional hearings. The amendment was approved and the spending bill signed into law by President Reagan December 22, 1987. Jack Anderson and Dale Van Atta, "Bad Dreams About Form 189," Washington Post, 27 December 1987, sec. C, p. 7.

proposed as a program ostensibly limited to the control of release of only classified national security information. However, as history has shown, it took the Defense Department only eight years to expand the application of censorship for "security" reasons to include censorship for "policy" concerns. How long before a future Administration, tired of public bickering among Executive agencies and fatigued of public disagreements with its policies, seeks to expand the application of the kind of review system envisioned by NSDD 84 to include restraint of dissent as well?

The lessons of the growth, expansion and application of the Air Force and Defense Department's prepublication review programs should serve as ample warning that, as one First Amendment scholar wrote:

> The preservation of freedom of expression in the future depends upon a sensitive awareness of the devastating effect on the expression of ideas that can be wrecked by apparently innocuous restrictions of speech.[85]

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[85] Bogen, p. 182.